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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/927,054	08/09/2001	Kevin J. McGrath	5500-78100	4136

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EXAMINER

ELLIS, RICHARD L

ART UNIT	PAPER NUMBER
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2183

DATE MAILED: 09/27/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/927,054	MCGRATH, KEVIN J.	
	Examiner	Art Unit	
	Richard Ellis	2183	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
 - If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
 - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
 - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-30 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-4, 7-13 and 16-30 is/are rejected.
- 7) ☒ Claim(s) 5, 6, 14 and 15 is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 04 October 2001 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date <u>12/3/2001</u> . | 6) <input type="checkbox"/> Other: ____. |

1. Claims 1-30 are presented for examination.
2. The title of the invention is not descriptive. A new title is required that is clearly indicative of the invention to which the claims are directed. The current title is imprecise.
3. 35 USC § 101 reads as follows:

"Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title".
4. Claims 18-29 are rejected under 35 USC § 101 because the claimed invention is directed to non-statutory subject matter. Applicant's claims 18-29 attempt to claim electromagnetic signals. Electromagnetic signals are not patentable because they do not fall within one of the statutory classes of subject matter allowed by 35 USC § 101. Applicant's claims are attempting to claim signals because the claims do not limit the scope of "carrier medium" to not overlap signals, and as well, pg. 40 of the specification explicitly indicates that the "carrier medium" can in fact be signals (see specification pg. 40 lines 3-5). Additionally, the phrase "which, when executed, causes" does not recite any positive execution of anything, and as such can not provide applicant a safe harbor that would render the claim statutory.

To define what is meant by a signal one must begin with basic concepts of the physical world. As explained in Gillespie et al., Chemistry 2 (Allyn and Bacon, Inc. 1986):

"We can describe the universe, and all the changes occurring in it, in terms of two fundamental concepts: matter and energy. Matter is anything that occupies space and has mass. Water, air, rocks, and petroleum, for example, are matter, but heat and light are not; they are forms of energy. The many different kinds of matter are known as substances. ..."

When referring to "structure" or "material" or "substance" what is being referred to is matter and things made up of matter. Energy is further defined at Chemistry 53:

"The capacity to do work is called energy. Gasoline, for example, possesses energy because when it is burned, it can do the work of moving a car. We measure energy by the work done, and thus energy, like work, is measured in joules.

In practice, it is convenient to distinguish different forms of energy, such as heat energy, light energy, electric energy, and chemical energy. ..."

Energy has physical existence because it is capable of doing work and of being

measured, but is incorporeal.

The claimed electromagnetic signal is a form of electric energy which has physical existence as an electromagnetic wave in a communications path or as an electrical voltage in the circuits of a transmitter or receiver. This is distinguished from the use of the term signal to refer to an abstract quantity such as a number. See In re Walter, 618 F.2d 758, 770, 205 USPQ 397, 409 (CCPA 1980) ("The 'signals' processed by the inventions of claims 10-12 may represent either physical quantities or abstract quantities; the claims do not require one or the other").

The starting point for nonstatutory subject matter analysis is the statute, 35 USC § 101, and the Supreme Court's basic principles as enunciated in Diamond v. Diehr, 450 U.S. 175 (1981). As stated in In re Warmerdam, 33 F.3d 1354, 1358, 31 USPQ2d 1754, 1758 (Fed. Cir. 1994):

"Despite the oft-quoted statement in the legislative history of the 1952 Patent Act that Congress intended that statutory subject matter "include anything under the sun that is made by man," S. Rep. No. 1979, 82d Cong., 2d Sess., 5 (1952), reprinted in 1952 U.S.C.C.A.N. 2394, 2399; H.R. Rep. No. 1923, 82d Cong., 2d Sess., 6 (1952), Congress did not so mandate. Congress included in patentable subject matter only those things that qualify as "any . . . process, machine, manufacture, or composition of matter, or any . . . improvement thereof. . . ." 35 U.S.C. § 101. . .

To include some things is to exclude others. The chore of defining exactly what is excluded under § 101, and applying such definitions to specific cases, has caused courts to expend much effort in trying to find the right words to describe some rather abstract notions. In Diamond v. Diehr, 450 U.S. 175 (1981), the Supreme Court summarized the scope of the § 101 exclusion and the Court's prior efforts at describing it by saying "[e]xcluded from such patent protection are laws of nature, natural phenomena, and abstract ideas. . . . Our recent holdings in Gottschalk v. Benson and Parker v. Flook, both of which are computer-related, stand for no more than these long-established principles." Id. at 185.

Two comments are relevant. First, subject matter must first fall within § 101 before the exclusions apply. See In re Pardo, 684 F.2d 912, 916, 214 USPQ 673, 677 (CCPA 1982) ("[A]ny process, machine, manufacture, or composition of matter constitutes statutory subject matter unless it falls within a judicially determined exception to section 101."); In re Sarkar, 588 F.2d 1330, 1333, 200 USPQ 132, 137 (CCPA 1978) ("[A] series of steps is a 'process' within § 101 unless it falls within a judicially determined category of nonstatutory subject

matter exceptions."). Second, it is not certain that "laws of nature, natural phenomena, and abstract ideas" represent an exhaustive set of statutory subject matter exclusions, such that "laws of nature, natural phenomena, and abstract ideas" combined with the set of "process, machine, manufacture, or composition of matter" comprises a universal set all possible types of subject matter. Thus, subject matter is not presumed to be statutory under 35 U.S.C. § 101 if it does not fit within the enumerated exclusions of "laws of nature, natural phenomena, and abstract ideas." The proper analysis is to determine whether the claimed subject matter falls within one of the four classes of § 101 and, if so, whether the subject matter falls within one of the exclusions.

First the claimed signal is analyzed under the definitions of the four statutory classes of § 101. The claimed signal is clearly not a "process" under § 101 because it is not a series of steps. The other three § 101 classes of machine, compositions of matter and manufactures "relate to structural entities and can be grouped as 'product' claims in order to contrast them with process claims." D. Chisum, Patents § 1.02 (1994). The three product classes have traditionally required physical structure or material (matter).

"The term machine includes every mechanical device or combination of mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result." Corning v. Burden, 56 U.S. (15 How.) 252, 267 (1854). A modern definition of machine would no doubt include electronic devices which perform functions. Indeed, devices such as flip-flops and computers are referred to in computer science as sequential machines. The claimed signal has no physical structure, does not itself perform any useful, concrete and tangible result and, thus, does not fit within the definition of a machine.

A "composition of matter" "covers all compositions of two or more substances and includes all composite articles, whether they be results of chemical union, or of mechanical mixture, or whether they be gases, fluids, powders or solids." Shell Development Co. v. Watson, 149 F. Supp. 279, 280, 113 USPQ 265, 266 (D.D.C. 1957), aff'd, 252 F.2d 861,

116 USPQ 428 (D.C. Cir. 1958). The claimed signal is not matter, but a form of energy, and therefore is not a composition of matter.

The Supreme Court has read the term "manufacture" in accordance with its dictionary definition to mean "the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery." Diamond v. Chakrabarty, 447 U.S. 303, 308, 206 USPQ 193, 196-97 (1980) (quoting American Fruit Growers, Inc. v. Brogdex Co., 283 U.S. 1, 11, 8 USPQ 131, 133 (1931), which, in turn, quotes the Century Dictionary). Other courts have applied similar definitions. See American Disappearing Bed Co. v. Arnaelsteen, 182 F. 324, 325 (9th Cir. 1910), cert. denied, 220 U.S. 622 (1911). These definitions require physical substance, which the claimed signal does not have. Congress can be presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. Lorillard v. Pons, 434 U.S. 575, 580 (1978). Thus, Congress must be presumed to have been aware of the interpretation of manufacture in American Fruit Growers when it passed the 1952 Patent Act.

A manufacture is also defined as the residual class of product. Chisum, § 1.02[3] (citing W. Robinson, The Law of Patents for Useful Inventions 270 (1890)). A product is a tangible physical article or object, some form of matter, which the claimed signal is not. That the other two product classes, machine and composition of matter, require physical matter is evidence that a manufacture was also intended to require physical matter. The claimed signal, a form of energy, does not fall within either of the two definitions of manufacture.

Continuing to look at the § 101 class of manufacture, in In re Hruby, 373 F.2d 997, 153 USPQ 61 (CCPA 1967), the CCPA held that there was no distinction between the meaning of "manufacture" in § 101 and "article of manufacture" in § 171 for designs. The issue in Hruby was whether that portion of a water fountain which is composed entirely of water in motion was an article of manufacture. The CCPA relied on the analysis of the term manufacture in Riter-Conley Mfg. Co. v. Aiken, 203 F. 699 (3d Cir.), cert. denied, 229 U.S.

617 (1913), a case involving a utility patent. The CCPA stated in *Hruby*, 373 F.2d at 1000, 153 USPQ at 65:

"The gist of it is, as one can determine from dictionaries, that a manufacture is anything made "by the hands of man" from raw materials, whether literally by hand or by machinery or by art."

The CCPA held that the fountain was made of the only substance fountains can be made of --water-- and determined that designs for water fountains were statutory. Articles of manufacture in designs manifestly require physical matter to provide substance for embodiment of the design. Thus, since "article of manufacture" under § 171 has the same meaning as "manufacture" under § 101, it is inevitable that a manufacture under § 101 requires physical matter.

Some indirect evidence that Congress intended to limit patentable subject matter to physical things and steps is found in 35 USC § 112 paragraph 6. Paragraph 6 states that an element in a claim for a combination may be expressed as a "means or step" for performing a function and will be construed to cover the corresponding "structure, material, or acts described in the specification and equivalents thereof." "Structure" and "material" indicate tangible things made of matter, not energy.

The claimed signal does not fit clearly within one of the three Diehr exclusions of "laws of nature, natural phenomena or abstract ideas." A signal may be an abstraction because it is disembodied in the sense of having no physical structure. Even if the signal were a signal in a wire, which requires movement of physical matter such as electrons, the signal is the propagating disturbance in the medium, not the medium itself. In any case, however, the exclusions are not controlling because subject matter must first fall within § 101 before the exclusions apply. Pardo and Sarkar, *supra*.

5. Claims 10-17 are rejected under 35 USC § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

5.1. The scope of meaning of the following terms are unclear:

5.1.1. "and the and the" claim 10; It appears that the words "and the" were duplicated at this point in this claim.

6. The following is a quotation of the appropriate paragraphs of 35 USC § 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

7. The following is a quotation of 35 USC § 103 which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

(c) Subject matter developed by another person, which qualifies as prior art only under one or more of subsections (e), (f), and (g) of section 102 of this title, shall not preclude patentability under this section where the subject matter and the claimed invention were, at the time the invention was made, owned by the same person or subject to an obligation of assignment to the same person.

8. Claims 1-3, 10-12, 18-20, 23-28, and 30 are rejected under 35 USC 102(b) as being clearly anticipated by Motorola, *MC68030 Enhanced 32-Bit Microprocessor User's Manual, Second Edition*.

Motorola taught the invention as claimed (as per claim 1), including a data processing ("DP") system comprising:

- 8.1. a processor (fig. 1-1) comprising;
- 8.2. a segment register (pg. 1-4, A0-A7) having a portion for storing a segment base address (pg. 2-10, section 2.4.8, An);
- 8.3. a register for storing an address (pg. 1-4, A0-A6);
- 8.4. an execution core (fig. 1-1, Execution unit) coupled to the segment register and the register (fig. 1-1), wherein the execution core is configured, in response to a first instruction (pg. 3-101, EXG), to swap the segment base address in the segment register and the address in the register (pg. 3-101, Description section).

9. As to claim 2, Motorola taught that the register was a special purpose register (address registers are special purpose because they hold addresses).
10. As to claim 3, Motorola taught that the register was a model specific register (address registers A0-A7 are specific to the MC68xxx model line, and therefore are "model specific").
11. As to claims 10-12, 18-20 and 30, they do not teach or define above the invention claimed in claims 1-3 and are therefore rejected under Motorola for the same reasons set fourth in the rejection of claims 1-3, supra. As to claims 18-20, the "carrier medium" is the physical sheet of paper upon which the instruction is printed.
12. As to claims 23, Motorola taught a carrier medium (the paper upon which the book is printed) configured to hold an operating system routine (pg. 4-2, second paragraph), including a first instruction (pg. 3-101, EXG) which, when executed, causes a segment base address from a segment register and a base address stored in a register to be swapped (pg. 3-101, Description), wherein the base address stored in the register is a pointer to one or more operating system data structures (pg. 2-20 to 2-23).
13. As to claim 24, Motorola taught that the routine further included one or more instructions which, when executed, save a first stack pointer from a stack pointer register to one of the one or more operating system data structures (pg. 3-107, LINK).
14. As to claim 25, Motorola taught that the route further included one or more instructions which, when executed, loaded a second stack pointer into the stack pointer register from the one or more operating system data structures, the second stack pointer indicating a stack used by the operating system routine (pg. 3-107, LINK).
15. As to claim 26, Motorola taught that the operating system routine included one or more instructions which, when executed, performed an operating system service (pg. 3-186, TRAP).
16. As to claim 27, Motorola taught that the operating system routine further included a second instruction subsequent to the one or more instructions, the second instruction, when executed, causing a swap of the segment base address from the segment register and the base address stored in the register to be swapped, thereby restoring a state of the segment register

and the register to the state prior to the execution of the first instruction (pg. 3-101, EXG).

17. As to claim 28, Motorola taught that the first instruction (EXG) and the second instruction (EXG) have the same binary coding (pg. 3-101, Instruction Format).
18. Claim 29 is rejected under 35 USC § 103 as being unpatentable over Motorola, as applied to claims 1-3, 10-12, 18-20, 23-28, and 30, supra., in view of Uffenbeck, *Microcomputers and Microprocessors, The 8080, 8085, and Z-80 Programming, Interfacing, and Troubleshooting*.
19. As to claim 29, Motorola did not specifically teach that the first instruction was an initial instruction of the operating system routine. However Uffenbeck taught that the initial instructions of an interrupt routine (an operating system routine) must both store state (pg. 266, part 1 under description of Fig. 6.22, see also fig. 6.22 at part labeled "[1] SAVE THE ENVIRONMENT") as well as restore interrupt routine state (pg. 266-267, part 2 under description of Fig. 6.22, see also fig. 6.22 at part labeled "[2] RESTORE PRINTING ENVIRONMENT"). Because Uffenbeck taught that these two steps are mandatory, and that they involve both saving a value as well as retrieving another value, it would have been obvious to a person of ordinary skill in the art at the time the invention was made to have utilized Motorola's exchange instruction for this purpose. By exchanging values, both the saving of a current value and retrieval of a new value will occur in one instruction instead of a pair of separate save and load instructions, resulting both in shorter programs and faster execution.
20. Claims 1-4, 7-9, 10-13, and 16-30 are rejected under 35 USC 102(b) as being clearly anticipated by Sites et al., *Alpha Architecture Reference Manual, Third Edition*.
Sites et al. was cited as a prior art reference in applicant's information disclosure statement, received December 3, 2001.
Additionally, pages Preface, 1-2, 2-4, 5-12 to 5-13, and 5-17 are newly cited by the examiner to show other features of the Alpha architecture.

Sites et al. taught the invention as claimed (as per claim 1), including a data processing ("DP") system comprising:

- 20.1. a processor (the ALPHA processor described by the document)
- 20.2. a segment register (pg. 5-33, IKSP register) having a portion for storing a segment base address;
- 20.3. a register for storing an address (a0/v0); and,
- 20.4. an execution core (the ALPHA chip inherently has an execution core) coupled to the segment register and the register, wherein the execution core is configured, in response to a first instruction (swpksp), to swap the segment base address in the segment register and the address in the register (see pg. 5-33, Operation section).
21. As to claim 2, Sites et al. taught that the register was a special purpose register (IKSP is the "Initial Kernel Stack Pointer", which is a special purpose).
22. As to claim 3, Sites et al. taught that the register was a model specific register (IKSP is specific to ALPHA model CPU's).
23. As to claim 4, Sites et al. taught that the segment base address and the address included greater than 32 bits (see Preface, last sentence on page).
24. As to claim 7, Sites et al. taught that the first instruction was privileged (pg. 5-33, Operation, "if (PSR<MODE> EQ User) then { Initiate illegal instruction exception } endif").
25. As to claim 8, Sites et al. taught that the execution core was configured, responsive to one or more predefined instructions (pg. 5-12, initpal, pg. 5-17, rdksp) separate from the first instruction, to read (rdksp) or write (initpal) the register, and wherein the one or more predefined instructions are also privileged (pg. 5-12, "if (PSR<MODE> EQ User) then { Initiate illegal instruction exception } endif", pg. 5-17, "if (PSR<MODE> EQ User) then { Initiate illegal instruction exception } endif").
26. As to claim 9, Sites et al. taught that the execution core was configured, responsive to the one or more predefined instructions or the first instruction, to signal an exception if a

privilege level of the processor is not sufficient for execution of the one or more predefined instructions or the first instruction (pg. 5-12, 5-17, and 5-33, "if (PSR <MODE> EQ User) then { Initiate illegal instruction exception } endif").

27. As to claims 10-13, 16-30, they do not teach or define above the invention claimed in claims 1-4 and 7-9 and are therefore rejected under *Sites et al.* for the same reasons set forth in the rejection of claims 1-4 and 7-9, *supra*. Additionally, as to claims 18-29, the physical paper upon which the *Sites et al.* book is printed is a "carrier medium" that contains "instructions" which "when executed" will cause the described activities to occur. Additionally, as to claims 23-29, *Sites et al.* describes the instructions as being part of an operating system and/or as routines used by the operating system (pg. 1-2, paragraph below title "PALcode - Alpha's Very Flexible Privileged Software Library").

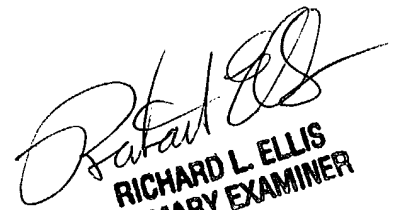
28. Claims 18-29 are rejected under 35 USC § 102(a) as being clearly anticipated by Hubicka Jan, posting to "patches@x86-64.org" email list.

Hubicka taught the invention as claimed (as per claim 18 or 23), including a data processing ("DP") system comprising:

28.1. a carrier medium (the physical sheet of paper upon which the instruction is printed) holding an instruction (swaps instruction) which, when executed, causes a segment base address from a segment register and an address stored in a different register to be swapped (the function of the swaps instruction listed on the printout is to swap the gs segment register with another register). As to the dependent claims 19-22 and 24-29, because the swaps instruction which Hubicka placed on the carrier medium (the sheet of paper) is exactly for the AMD x86-64 architecture, it is exactly the instruction claimed by applicant (because applicant is claiming the AMD x86-64 swaps instruction), and therefore it anticipates exactly all the limitations recited in all the listed dependent claims because it is exactly the disclosed instruction.

29. Claims 5-6 are objected to as being dependent upon a rejected base claim, but would render the base claim allowable if bodily incorporated into the base claim such that the new base claim included all of the original limitations of the base claim, any intervening claims, and the objected claim.
30. Claims 14-15 would be allowable if rewritten to overcome the rejection under 35 USC § 112 and to include all of the limitations of the base claim and any intervening claims.
31. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.
- The email posting by Karsten Keil shows additional disclosure of the swapgs instruction.
- US Patent 6,792,499 shows swapping a pair of base address registers in a memory controller.
32. A shortened statutory period for response to this action is set to expire 3 (three) months and 0 (zero) days from the mail date of this letter. Failure to respond within the period for response will result in **ABANDONMENT** of the application (see 35 USC 133, MPEP 710.02, 710.02(b)).
33. Any inquiry concerning this communication or earlier communications from the Examiner should be directed to Richard Ellis whose telephone number is (703) 305-9690. The Examiner can normally be reached on Monday through Thursday from 7am to 5pm.
- If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's supervisor, Eddie Chan, can be reached on (703) 305-9712. The fax phone number for the USPTO is: (703)872-9306.
- Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 305-3900.

Richard Ellis
September 23, 2004


RICHARD L. ELLIS
PRIMARY EXAMINER